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IN THE

Supreme Court of the United States

October Term, 1962

No. 914

LOUIS C. VIALE, JOSEPH S. PINNAVIA, LOUIS A. ABBONANDO, ANTHONY F. FINO, and NICHOLAS S. LONGO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PARRINO & COOPER,
Attorneys for Petitioners,
PETER L. PARRINO, *of counsel,*
774 Ellicott Square,
Buffalo 3, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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No. .....

LOUIS C. VIALE, JOSEPH S. PINNAVIA, LOUIS A. ABBONANDO, ANTHONY F. FINO, and NICHOLAS S. LONGO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully show to this Honorable Court:

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, a copy of which is hereto annexed, Appendix A, pp. 17-30, as the same has not yet been reported in any volume of the Federal Reporter, as well as the opinion of the United States District Court for the Western District of New York, a copy of which is also annexed hereto, Appendix B, pp. 31-32, as the same was not reported in any volume of the Federal Reporter.

Basis of Jurisdiction

The judgment sought to be reviewed herein is that of the United States Court of Appeals for the Second Circuit, decided on January 31, 1963, and entered on the same day.

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1) and the Supreme Court Rules, Rule 19(b), in that the Court of Appeals has decided an important state question in a way in conflict with applicable state law, and has decided an important question of federal law which has not been, but should be, settled by this Court, and further, that the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court as well as itself.

Questions Presented for Review

I. Prior to October 23, 1962, did Special Agents of the Internal Revenue Service have any statutory authority to execute the arrest and search warrants in the case at bar?

II. May a private person conduct a search of a person whom he arrests by virtue of a "citizen's arrest"?

III. May a private person detain another against his will, without a warrant of arrest, conduct a search of his person, and, after finding incriminating evidence on his person, place him under arrest without a sufficient showing that a crime was committed in his presence?

IV. In interpreting state law, may a federal court ever interpret the state law in a manner contrary to the reported decisions of the highest court of the said state on the same subject-matter?

Provisions of Law Involved

The constitutional provision, statutes and rules which this case involves are all set forth in the appendix hereto, in the order set forth herein, and are as follows: United States Constitution, Amendment IV; Federal Rules of Criminal Procedure, Rules 4(a), (c)(1) and 41(c); Title 18 United States Code, Sections 371; Title 26 United States Code, Sections 4401, 4411, 4412, 7203, 7262, 7608; McKinney's New York Code of Criminal Procedure, Sections 154, 167, 171, 177, 183, 798 and 960.

Statement of the Case

Each petitioner, together with a sixth defendant whose conviction was reversed on appeal, was indicted on June 2, 1961, in a three count indictment wherein Count 1 charged the petitioners with conspiring to engage in the business of accepting wagers without having paid the special occupational tax required by 26 U. S. C. 4411, in violation of 18 U. S. C. 371. Count 2 charged commission of the substantive offense described in the conspiracy count, in violation of 26 U. S. C. 7262. Count 3 charged failure to file tax returns as required by 26 U. S. C. 4412, in violation of 26 U. S. C. 7203.

On March 8, 1962, a motion before trial for the suppression of evidence was made in behalf of all petitioners and denied without opinion. Subsequently, after trial by jury, the petitioners were found guilty on all counts of the indictment and sentenced on June 25, 1962.

Petitioner VIALE was sentenced to one year's imprisonment and was fined a total of $5,000.00. Petitioner FIXO received a sentence of one year's imprisonment and fined $3,000.00. All the other petitioners were sentenced to one

year's imprisonment but the execution of their sentences was suspended and they were placed on probation for five years and fined $3,000.00 each.

Appeals were duly taken by the petitioners and the sixth defendant, one MARINO J. FALIERO, SR. The Court below affirmed the convictions of the petitioners but reversed FALIERO's and ordered the indictment dismissed as to him.

A stay of the mandate of the Court of Appeals was granted on February 13, 1963, pending an application for certiorari to this Court.

This prosecution was the result of an investigation by the Internal Revenue Bureau which culminated in a raid on premises known as No. 19 Allen Street and No. 111 N. Pearl Street in the City of Buffalo on the 12th day of May, 1961. A search warrant for both of these premises was obtained prior to the raid by Special Agents as well as a warrant of arrest for the petitioner, LOUIS C. VIALE. No arrest warrants or search warrants were obtained prior to the raid for the other petitioners.

When the raid was initiated the petitioner, VIALE, was situated in front of his premises on 19 Allen Street and the petitioners, PINNAVIA, ABBONANDO, FINO and LONGO, were situated in a room on the second floor of said premises and toward the rear of the same building.

Simultaneously, other Special Agents went to the premises known as 111 N. Pearl Street located to the rear of the premises known as 19 Allen Street and thereupon conducted a search of those premises.

In order to gain access to the rear of the building known as No. 19 Allen Street, four Special Agents forcibly opened a rear door in the premises after allegedly announcing themselves as Special Agents and that they

possessed a search warrant and thereupon went to the upper portion of the said building where the remaining proceedings took place (R. Vol. I, pp. 61-91)[1]. Likewise, the other Special Agents who were dispatched to the premises known as 111 N. Pearl Street entered those premises forcibly whereas certain other Special Agents were admitted into the premises by the wife of the petitioner, VIALE (R. Vol. I, pp. 93-102).

When the Special Agents arrived in the room located in the upper portion of 19 Allen Street, they herded the four petitioners, PINNAVIA, ABBONANDO, FINO and LONGO, into a room adjoining the room wherein they were originally located and one by one interrogated them (R. Vol. I, p. 64).

VINCENT J. CARBONE, one of the Special Agents who testified on the trial, stated that each of the petitioners was interrogated individually and was asked to empty the contents of his pockets (R. Vol. I, pp. 64, 70, 73, 78, 82). The claim of the Government was that each of the petitioners, upon being interrogated, stated that he was visiting a sick friend and refused to answer any further questions. Among the incriminating items which were admitted in evidence over objection was a common Yale key which fitted one of the locks in the premises as well as other documents and papers containing phone numbers, names and other incriminating subject matter.

In regard to the premises known as 111 N. Pearl Street, one of the Special Agents who testified, namely GEORGE C. MONTZ stated that when he knocked on the premises and asked for permission to enter, the petitioner, VIALE's wife, opened the door but that shortly thereafter several

[1] The letter "R" represents references to the record in the Court below

of the other Special Agents, as well as members of the Alcohol, Tobacco and Tax Unit, were also present and had forcibly entered another portion of the premises without any permission from the occupant of the premises as well as any of the Special Agents who were already inside of the premises (R. Vol. I, pp. 93-96). As a result of the search which was thereafter conducted in these premises, certain telephone indices as well as other incriminating material was seized and received in evidence on the trial.

ARGUMENT AND REASONS WHY THE WRIT SHOULD BE GRANTED

POINT I

Prior to October 23, 1962, did Special Agents of the Internal Revenue Service have any statutory authority to execute the arrest and search warrants in the case at bar?

The pertinent portion of the Federal Rules of Criminal Procedure, Rule 4, states:

> "(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it * * *
>
> (c) Execution or Service; and Return.
>
> (1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law * * *"

The pertinent portion of the Federal Rules of Criminal Procedure, Rule 41, states:

> "(c) Issuance and Contents * * *
>
> The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in en-

forcing any law thereof or to a person so authorized by the President of the United States * * *"

On September 2, 1958, Title 26 United States Code, Section 7608 was enacted by Congress in order, among other things, to give Special Agents of the Internal Revenue Service authority to execute and serve search and arrest warrants and to make arrests without warrant of persons committing any offense against the United States in the presence of the arresting officer. However, as the statute was first enacted, it only applied to the enforcement of subtitle E of the Internal Revenue Code and other laws pertaining to liquor, tobacco, and firearms. The Court below correctly interpreted the statute as not applying to the prosecution of the petitioners since the violations alleged did not relate to subtitle E but rather to subtitles D and F.

As evidence of the glaring omission on the part of the Congress, the statute was amended on October 23, 1962, at a time after the appeal from the convictions herein was perfected and before the appeal was argued. Now, the statute, as amended, would be applicable to wagering tax violations occurring after October 23, 1962, by virtue of subparagraph (b).

The Court below was correct in holding 26 U. S. C. 7608 inapplicable to the prosecution herein, and, therefore, applying the state law of arrest in accordance with the principle laid down by this Honorable Court in *United States v. DiRe*, 332 U. S. 581. However, as will be seen by the ensuing argument herein, the Court below incorrectly applied established Federal and State decisions to the facts in the case at bar.

Accordingly, the Special Agents had no statutory power or authority to execute the arrest warrant upon the

petitioner, VIALE, as well as the search warrants on him and on the premises which were searched since no such authority is given by either Rule 4 or Rule 41 of the Federal Rules of Criminal Procedure.

POINT II

May a private person conduct a search of a person whom he arrests by virtue of a "citizen's arrest"?

The history surrounding the enactment of the Fourth Amendment to the United States Constitution teaches us that the right to search is one which should always be exercised with the utmost restraint. Such a right was never intended to be conferred upon any person other than a police officer sworn to uphold the law.

Nowhere in the statute law of New York is there any express authority for a private person to conduct a search of a person who was lawfully arrested by the said private person. In fact, Section 798 of the Code of Criminal Procedure of New York specifically states:

> "A search warrant may, in all cases, be executed by any of the officers mentioned in its direction, *but by no other person*, except in aid of the officer, on his requiring it, he being present and acting in its execution." (Emphasis added.)

One federal court, in *Application of Fried*, 68 F. Supp. 961 (D. C. N. Y. 1946), has decided that a federal officer in executing an invalid arrest warrant could not effect a search of the person arrested, although the arrest was a valid one since the crime was committed in the arresting officer's presence, the conclusion of the court being that "a private person could in no event make a search incidental to an arrest."

If, therefore, only peace officers may execute a search warrant, how can a private citizen conduct a search incidental to a lawful arrest, assuming the arrest to be lawful, which, of course, is not here conceded? The Court below, however, has decided that a private person may search one lawfully under arrest. *United States v. Park Avenue Pharmacy*, 2 Cir., 56 F. 2d 753, 756. See, also, *Coplon v. United States*, D. C. Cir., 191 F. 2d 749, 754, cert. denied 342 U. S. 926; this latter case was also cited by the Court below, but apparently, the same Court failed to account for the fact that it had previously decided *Coplon v. United States*, 2 Cir., 185 F. 2d 629 exactly contrary to the decision of the District of Columbia Circuit Court of Appeals, yet both cases involved the same defendant and arose out of the same transaction and the arrest in question was the same in both cases!

Moreover, the other case cited by the Court below, *Park Avenue Pharmacy, supra*, involved a situation where the aggrieved person was not the one who objected to the search of his person because the Court, at page 756 states: "None but Cogen could question the legality of the seizure anyway."

The precise point involved here has obviously never been decided by this Honorable Court but, it is submitted, the question should be resolved because of the impact of *Mapp v. Ohio*, 367 U. S. 643, together with the fact that most of the states of the Union have statutes similar to New York's regarding the right of private persons to arrest without warrant for crimes committed in their presence. The question will undoubtedly arise in future prosecutions throughout the nation, in state courts as well as federal.

The rationale which justifies searches incident to lawful arrests, as contained in *United States v. Rabinowitz*, 339 U. S. 56, ought only to be applied in the case where a peace officer makes an arrest without warrant and not to the case of a private citizen. The Court below sets a dangerous precedent by applying the rationale in *Rabinowitz, supra*, to the facts in the case at bar.

POINT III

May a private person detain another against his will, without a warrant of arrest, conduct a search of his person and, after finding incriminating evidence on his person, place him under arrest without a sufficient showing that a crime was committed in his presence?

By virtue of Section 183, New York Code of Criminal Procedure, "A private person may arrest another, (1) For a crime, committed or attempted in his presence; * * *" In this respect, the power of a private person to arrest without a warrant, for a crime committed in his presence, is identical to the power of a peace officer, by virtue of Section 177 of the New York Code of Criminal Procedure, since a peace officer, without a warrant, may arrest a person, "(1) For a crime, committed or attempted in his presence; * * *"

Since Special Agents of the Internal Revenue Service are not "peace officers" according to the New York Code of Criminal Procedure, Section 154, Appendix C, pp. 39-41, the arrests herein could only have been grounded on the authority of the Special Agents to arrest, in the capacity of private citizens. However, in order to constitute the arrest a valid one, the crime must be "committed or attempted" in the presence of the private citizen.

If the prosecution herein were for bookmaking, the arrests might have been valid according to what the Special Agents saw when they entered the second floor portion of the premises at 19 Allen Street. However, the prosecution herein was for wagering tax violations and in order for the Special Agents to know that a federal crime was being committed they would first have to perceive that the petitioners, excluding VIALE, were accepting wagers (which, in and of itself, is not a federal crime) and, secondly, they would have had to know, prior to the arrests, that none of the same petitioners had purchased the federal tax stamp. The only evidence in the record along this line is that the petitioner, VIALE, was known to have not purchased the stamp and th t the premises at 19 Allen Street were not registered as an establishment where wagers were being accepted. This lack of knowledge, therefore, on the part of the Special Agents, vitiates the validity of the arrest of the petitioners found in the upper portion of 19 Allen Street since there was not even probable cause for their arrest without a warrant. The issue of "probable cause", however, leads us to the concluding question presented for review.

POINT IV

In interpreting state law, may a Federal Court ever interpret the state law in a manner contrary to the reported decisions of the highest court of the said state on the same subject-matter?

The answer to this point is, quite obviously, and emphatic, no. In applying state law, a federal court must interpret state statutes in the same manner in which the highest court of the same state has interpreted the same

statute. Accordingly, it is wise, at this point to ascertain the manner in which the New York Court of Appeals has interpreted Section 177 of the Code of Criminal Procedure, keeping in mind, however, the fact that the power of private persons to arrest without a warrant for a crime committed in their presence, is identical to the power conferred on peace officers. The most recent decision in point is that of *People v. Moore*, 11 N. Y. 2d 271, 228 N. Y. Supp. 2d 822, decided on May 10, 1962. In this case, a police officer saw men approach the defendant and hand paper money to him. The officer had no warrant of arrest or for the search of the person of the defendant. The defendant nevertheless was placed under arrest and $83.00 in currency was found on him together with a policy slip showing 12 "plays". The Court held, in reversing the conviction, that what was observed by the police officer was insufficient to prove the commission of any crime, and, hence, the defendant's arrest and search of his person were both illegal.

It is, therefore, submitted that this case is authority in New York that in the case of misdemeanors, the crime must be committed in the presence of the arresting officer and whether or not there was "probable cause" or "reasonable grounds" for believing a misdemeanor was being committed is now irrelevant. "Probable cause" or "reasonable grounds" are the tests to be applied only in the case of felonies and not in the case of misdemeanors, so far as the State of New York is concerned. Query, could the Special Agents, in the case at bar, have known that a federal crime was being committed in their presence? The answer is no.

This, however, is not the only instance in which the Court below erred in applying state law because in *United*

States v. DiRe, supra, this Honorable Court had occasion to apply the law of New York relating to arrest without warrant. The facts in this case were as follows: The defendant was convicted on a charge of knowingly possessing counterfeit gasoline ration coupons in violation of Section 301 of the Second War Powers Act, 1942. The decisive evidence was that obtained by search of his person, after he was arrested without a warrant of any kind. The Court of Appeals, Second Circuit, reversed the conviction, one judge dissenting, holding that both his search and arrest were illegal. The Government was granted certiorari on the sole question as to whether the Court of Appeals decision that the evidence was the fruit of an illegal arrest and search was correct.

In *DiRe, supra*, an O. P. A. investigator was told by one Reed that he was to buy counterfeit gasoline ration coupons from a certain Buttitta at a designated place in Buffalo. The investigator and a detective from the Buffalo Police Department trailed Buttitta's car and came upon it parked at the designated place. Reed was found in the rear with two gasoline ration coupons which were counterfeit. He said he got them from Buttitta who was in the driver's seat. Beside him was DiRe. All three were taken into custody, "frisked" and then taken to the police station. Here DiRe complied with a direction to put the contents of his pockets on a table. Two gasoline and several fuel ration coupons were laid out. About two hours later, after questioning, he was "booked" and thoroughly searched. One hundred inventory gasoline ration coupons were found in an envelope concealed between his shirt and underwear. These, as well as the gasoline coupons earlier disclosed, proved to be counterfeit.

After the Government attempted to justify the arrest and search of DiRe on the basis of *Carroll v. United States*, 267 U. S. 132, this Court, per Justice Jackson, held: "We see no ground for expanding the ruling in the Carroll Case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, *by mere presence in a suspected car*, loses immunities from search of his person to which he would otherwise be entitled. (Emphasis added).

This Court thereupon ruled that since there was no applicable federal statute authorizing the arrest without warrant that it was, therefore, necessary to apply the law of New York relating thereto. Section 177 of the Code of Criminal Procedure of New York was held to be the controlling statute in order to determine the validity of the arrest of DiRe.

This Court then went on to say, "It is admitted that at the time of the arrest the officers had no information implicating DiRe and had no information pointing to possession of any coupons, unless his presence in the car warranted that inference."

And finally, in response to the Government's argument that DiRe submitted to custody and voluntarily emptied his pockets and submitted to a search of his person, this Court held, "But courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A layman may not find it expedient to hazard resistance on his own judgment of the law at the time when he cannot know what information, correct or incorrect, the officers may be acting upon * * *

"It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tri-

bunals erected by the law for the purpose of judging his case. An inference of probable cause from a failure to engage in discussion of the merits of the charge with arresting officers is unwarranted * * *"

At this point it is probably wise to note that the comment of this Court in *Henry v. United States*, 361 U. S. 98, at page 103, on the question of when an arrest takes place:

> "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."

Although the arrests in the case at bar did not take place in an automobile, as in *Henry, supra*, the same principles should apply. See, for example, Section 167 of the Code of Criminal Procedure of New York which states, "Arrest is the taking of a person into custody that he may be held to answer for a crime." See also, New York Code of Criminal Procedure, Section 171, as to how an arrest is made, Appendix C (p. 41).

Summary of Reasons for Granting This Writ

There can be little doubt that any question involving a deprivation of a person's rights under the Fourth Amendment of the United States Constitution regarding his right to be secure in his person is a substantial question and one which ought to be reviewed because of its general importance. It affects not only the litigants of the case at bar but citizens at large throughout the nation, particularly because of the impact of *Mapp v. Ohio, supra*. Accordingly, review in this case would be in the interest of the law itself, its appropriate exposition and enforcement, and not merely in the interest of the litigants themselves.

Next, there are special and important reasons for granting review because the issues herein involve a conflict of decisions among two federal appellate Courts, namely the Second Circuit and the District of Columbia Circuit on factual situations which are identical in nature. Moreover, this is not a situation where there is any likelihood whatsoever that this conflict will be resolved as a result of future cases. Nor is the conflict so narrowly confined that there is little likelihood that there will be any continuing future consequences.

Lastly, there is the most serious question regarding whether or not the Court below has correctly interpreted New York law in view of *People v. Moore, supra*, as well as *United States v. DiRe, supra*.

Wherefore, your petitioners pray, for the foregoing reasons, that a writ of certiorari issue out of, and under the seal of this Court to the United States Court of Appeals for the Second Circuit, to review its judgment.

Respectfully submitted,

PARRINO & COOPER,
Attorneys for Petitioners,
PETER L. PARRINO, *of Counsel,*
774 Ellicott Square,
Buffalo 3, New York.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 166—October Term, 1962

(Argued December 5, 1962 Decided January 31, 1963)

Docket No. 27719

THE UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS C. VIALE, MARINO J. FALIERO, SR., JOSEPH S. PINNAVIA, LOUIS A. ABBONANDO, ANTHONY F. FINO and NICHOLAS S. LONGO,

Appellants.

Before: Lumbard, Chief Judge,
Swan and Friendly, Circuit Judges.

Appeals from judgments of conviction in the United States District Court for the Western District of New York, after trial before Henderson, J., and a jury, on an indictment charging the defendants with illegally engaging in the business of accepting wagers. Reversed as to Faliero; affirmed as to the other appellants.

Appendix A

Charles F. Crimi, Assistant United States Attorney (John T. Curtin, United States Attorney for the Western District of New York, on the brief), for appellee.

Parrino & Cooper, Buffalo, New York, for defendants-appellants.

Swan, Circuit Judge:

Each of the six appellants was convicted after a jury trial on each count of a three count indictment filed June 2, 1961. Count 1 charged the defendants with conspiring to engage in the business of accepting wagers without having paid the special occupational tax required by 26 U. S. C. § 4411, in violation of 18 U. S. C. § 371. Count 2 charged commission of the substantive offense described in the conspiracy count, in violation of 26 U. S. C. § 7262. Count 3 charged failure to file tax returns as required by 26 U. S. C. § 4412, in violation of 26 U. S. C. § 7203.

The trial began March 13, 1962. On March 8, nine months after the indictment, the defendants moved to suppress evidence. The motion was denied after oral argument; and the defendants declined the opportunity offered them by the court to call witnesses. During the trial the defendants moved for judgment of acquittal after the Government rested. This was denied, and the defendants failed to renew their motion at the end of all the evidence. The Government contends that this precludes the appellants from questioning the sufficiency of the evidence to support the judgments of conviction, but as our later discussion will show the contention need be considered only with respect to Faliero. The sentences appealed from were

imposed on June 25, 1962.[1] Notice of appeal was filed the following day.

The arrest and indictment of the six appellants was the result of an investigation by Special Agents of the Internal Revenue Service which began about the middle of March, 1961 and culminated on May 12 of that year in a raid on adjoining houses in Buffalo, N. Y., known as 19 Allen Street and 111 N. Pearl Street, both of which were owned by Viale. The Agents conducting the raid had obtained search warrants for both houses, and a warrant for the arrest of Viale. They had no warrants for the arrest of the other appellants. From the undercover investigation conducted by Agent Willis, the Agents knew, when they raided the premises that Viale and confederates, whose names they did not know, were engaged in the business of accepting wagers in a room on the second floor, rear, of 19 Allen Street. They knew also that no one at either 19 Allen Street, or 111 N. Pearl Street had paid the tax or registered or filed a return from those addresses, as required by the applicable statutes. On raiding the premises (Pinnavia, Abbonando, Longo and Fino were found in the second floor room which was equipped with four telephones, and contained betting slips, racks and other paraphernalia appropriate for a wagering hideout. Faliero was not present; he entered the ground floor of 19 Allen Street some two hours later and upon entry was told by

[1] Appellant Viale was sentenced to imprisonment for one year in an institution to be designated by the Attorney General and was fined $2,000 on counts 1 and 3. On count 2 he was fined $1,000. The prison sentences were to be served concurrently, and the $5,000 of fines were to be paid within 30 days.

Appellant Fino received a sentence identical with Viale's except that the total of his fines was $3,000.

In the case of each of the other four appellants, execution of the prison sentences was suspended, he was placed on probation for five years, and the total of his fines to be paid within 30 days was $3,000.

the Agents to go up to the second floor room. Each of these five appellants was interrogated separately by Agent Carbone in an adjoining room and was asked to empty his pockets. Each stated that he was there to visit a sick friend and refused to answer any further questions. Carbone testified that they emptied their pockets voluntarily and that each possessed a key to 19 Allen Street as well as other incriminating matter.

There is no contention by Viale that the warrants for the search of his premises and for his arrest were invalid. Indeed, his guilt was so clearly established by his prior dealings with Agent Willis that no discussion seems necessary. The judgment against Viale is affirmed.

Each of the other appellants claims that his arrest was unlawful and consequently the taking of his personal effects cannot be justified as incidental to a lawful arrest. Except as to Faliero, we hold the arrest valid and the incidental taking of personal effects justified.

The Government can point to no federal statute authorizing agents employed "for the administration and enforcement of the internal revenue laws", 26 U. S. C. § 7803(a), as these agents were, to make an arrest without a warrant, unless authority can be found in 26 U. S. C. § 7608, and frankly admits there is "some question" whether this section is applicable to the enforcement of the wagering tax laws. We hold that the section is not applicable.[2] But

[2] Section 7608 relates to internal revenue agents "charge[d] with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of subtitle E or of any other law of the United States pertaining to the commodities subject to tax under such subtitle," and authorizes such an agent "in respect to the performance of such duty, [to] make arrests without warrant for any offense against the United States committed in his presence, or for any felony cogniz-

(Footnote continued on following page)

the inapplicability of § 7608 does not necessarily mean that the Agents had no authority to arrest without a warrant in the circumstances disclosed, since the section does not "change or in any way limit the then existing authority of internal revenue agents to make arrests or conduct searches as an incident thereto." *United States v. Murphy*, 3 Cir., 290 F. 2d 573, 575.

United States v. DiRe, 332 U. S. 581, 589, makes clear that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." Therefore we turn to the law of New York.[3]

Two provisions of the New York Code of Criminal Procedure give authority to arrest without a warrant. The first is § 177 relating to arrests by any "peace officer." In *United States v. Perez*, 2 Cir., 242 F. 2d 867, cert. denied 354 U. S. 941, it was held that § 177 authorized arrests in New York by agents of the Federal Bureau of Narcotics, apparently on the theory that this section applies to anyone who is a "law enforcement officer." 242 F. 2d at 869. This decision, for which no authority was cited other than § 177 itself, is plainly wrong. Section 960 of the Code of Criminal Procedure states that "Unless when otherwise provided,

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(Footnote continued from preceding page)

able under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony." Subtitle E has to do with the enforcement of federal statutes other than those which appellants are charged with violating, namely, conspiracy (18 U. S. C. § 371), occupational tax (subtitle D, 26 U. S. C. § 4411), and registration and returns (subtitle D, 26 U. S. C. § 4412).

[3] We realize that problems may arise if the state law is either more or less liberal than federal law as to the extent that search may be performed as an incident to lawful arrest. But since there appears to be no difference between New York and federal law in this regard, we need not consider what the consequences would be if a difference existed.

the term 'peace officer' signifies any one of the officers mentioned in section one hundred and fifty-four." And § 154—which the court in *Perez* did not cite—contains a long list of "peace officers" which does not include agents of the Internal Revenue Service, or any other federal agents. Moreover, a New York court has held that a federal revenue agent is not a "peace officer" within § 154. *People v. Chesnik*, 123 Misc. 509, 205 N. Y. Supp. 146. We hereby expressly overrule *Perez*.

The second provision relied upon by the Government is § 183 of the N. Y. Code of Criminal Procedure. This gives a "private person" authority to arrest another "for a crime committed or attempted in his presence," or "when the person arrested has committed a felony, although not in his presence."

Relying on *Application of Fried*, S. D. N. Y., 68 F. Supp. 961, the appellants contend that even if §183 applies, it gives no authority to search the person arrested. In *Fried*, on facts very similar to those presented here, Judge Rifkind declared, at page 964, that a "private person could in no event make a search incidental to an arrest." This holding, however, is contrary to our decision in *United States v. Park Avenue Pharmacy*, 2 Cir., 56 F. 2d 753, 756, and also to *Coplon v. United States*, D. C. Cir., 191 F. 2d 749, 754, cert. denied 342 U. S. 926. The rationale that justifies searches incident to lawful arrests—as outlined in *United States v. Rabinowitz*, 339 U. S. 56, 60-61—would seem to apply with equal force whether the arrest is made by an officer or a private citizen. If the arrests were valid under § 183, the searches incidental thereto were valid also.

Appendix A

As above noted, § 183 permits a private person to arrest a person who has committed a felony "although not in his presence." Although the indictment could have charged the offenses as felonies, 26 U. S. C. § 7201, it charged them as misdemeanors. Since there has thus been no judicial finding that these appellants in fact committed felonies, we shall assume that the validity of the arrests must be determined on the basis of the Agents' authority acting as private persons, to arrest for misdemeanors committed in their presence. *Cf. United States v. DiRe*, 332 U. S. at 591-92.

Preliminarily, it is necessary to determine what is meant by "presence" and by "arrest," since the misdemeanor must be committed in the "presence"[4] of the arrestor and the search of the arrestee must be incidental to his "arrest." It is now clear under New York law that one person may without a warrant justifiably arrest another who commits a misdemeanor in his "presence" only when the arrestor actually observed acts which were "in themselves sufficiently indicative of a crime being in the course of commission * * *"; unless this be true, the crime was "not committed in the arresting officer's presence * * *" *People v. Moore*, 11 N. Y. 2d 271, 272, 273, 228 N. Y. S. 2d 822, 823, 824. See also *People v. Esposito*, 118 Misc. 867, 194 N. Y. Supp. 326, 333, where it was said that the arrestor must have perceived "indications of the commission of the offense sufficient to induce reasonable belief of the fact."[5]

[4] For a discussion of the meaning of the "presence" requirement at common law and under statutes like New York's § 183, see 1 *Harper & James, Torts*, p. 282; *Restatement, Torts*, § 119, comment on clauses (c) and (d).

[5] In *Esposito* and *Moore*, the arrestors were police officers, and the cases thus dealt with the authority afforded a "peace officer" by N. Y. Code Crim

(Footnote continued on following page)

In short, it is not sufficient to justify an arrest by a private citizen without warrant that the arrestee be subsequently shown to have been engaged in committing a misdemeanor at the moment of the arrest; the arrestor must have had reason to be aware at that time of the commission of the crime.

To ascertain the meaning of "arrest," we turn first to the definition contained in the New York Code of Criminal Procedure. Section 167 states that "arrest is the taking of a person into custody that he may be held to answer for a crime." Section 171 adds that "and arrest is made by an actual restraint of the person of the defendant or by his submission to the custody officer." And in *Henry v. United States*, 361 U. S. 98, the Court declared that:

> "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete." 361 U. S. at 103.

Accordingly, we hold that the arrests of Fino, Pinnavia, Abbonando and Longo took place at the moment when they submitted to the custody of the Agents in the upper room at 19 Allen Street; Faliero's arrest came when he entered 19 Allen Street and was ordered by an Agent to go upstairs. The validity of each arrest must, therefore, depend upon whether the arresting Agents had reasonable cause

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Proc. § 177 to arrest without a warrant "for a crime, committed or attempted in his presence." As pointed out above, however, we are dealing with the arrests in this case on the assumption that the officers here acted as "private persons" within the terms of N. Y. Code Crim. Proc. § 183. The relevant language of the two sections is identical, and it has been held that the rights of peace officers and private persons to arrest without warrant for misdemeanors committed within their presence are equal. *People v. Averill*, 124 Misc. 383, 208 N. Y. Supp. 774. Thus we are justified in using cases decided under § 177 as precedents under § 183.

to believe that each appellant was committing a misdemeanor at the moment of his arrest.

With respect to Fino and Pinnavia, who were using the telephones when the Agents entered the room, it is easy to hold that the Agents had reasonable cause to believe that these appellants were engaging in the business of accepting wagers illegally, since the Agents knew that no one from the premises had paid the tax, registered, or filed a return. As to Abbonando and Longo, who were in the same room, we think the Agents had reasonable cause to believe that they were engaged in a conspiracy with Fino and Pinnavia. Accordingly, we hold that these four arrests, although made without warrants, were legal under § 183 of the N. Y. Code of Criminal Procedure and that the searches incident to these arrests were legal. *United States v. Festa*, D. Mass., 192 F. Supp. 160, is not to the contrary, for there the Government conceded that the defendant was not committing a crime when arrested; there has been no such concession here.

The situation as to appellant Faliero is different. He entered 19 Allen Street about two hours after the commencement of the raid, through a door on the ground floor. Upon his entry he was intercepted by an Agent and told to go upstairs. These facts are insufficient to support a finding that he was then committing or attempting to commit a misdemeanor. On this record, we think the Agents could not have had reasonable cause to believe he was. The Government's argument that Faliero consented to a search of his person—on which was found incriminating evidence—defies ordinary common sense. Consent to search is not to be lightly inferred. *United States v. Page*, 9 Cir., 302

F. 2d 81, 83-85; *cf. United States v. Dornblut*, 2 Cir., 261 F. 2d 949, 950-51, cert. denied 360 U. S. 912. Without such incrimination, the evidence against Faliero was insufficient to go to the jury.

The Government argues that, nevertheless, the indictment cannot now be dismissed as to Faliero because of appellants' failure to renew their motion for acquittal at the close of their own case. It is generally true that a defendant must move for acquittal at the close of all the evidence, in order to preserve on appeal any question as to the sufficiency of the evidence. *Rosenbloom v. United States*, 8 Cir., 259 F. 2d 500, cert. denied 358 U. S. 929; *Cooper v. United States*, 5 Cir., 256 F. 2d 500; *Picciurro v. United States*, 8 Cir., 250 F. 2d 585. However, procedural deficiencies will be disregarded when there is manifest error and it is necessary to prevent a miscarriage of justice. *Corbin v. United States*, 10 Cir., 253 F. 2d 646, 648. Since the motion, if made, would probably have been denied on the basis of the ruling as to the admissibility of evidence found on his person, failure to renew the motion at the close of the evidence was excusable. In order to prevent a miscarriage of justice as to Faliero, we reverse his conviction.

The remaining contentions of the other appellants can be disposed of briefly. They argue that the court below denied their pretrial motion to suppress because their motion papers were insufficient to show standing, for lack of a definitive statement of which evidence each appellant wished suppressed, and that this was error under *Jones v. United States*, 362 U. S. 257. As the Government points out, the court at argument on the motion offered appellants

a chance to put on witnesses, and the offer was refused. In view of this, it would seem that the court held the appellants had "standing" to object, but were unwilling to support their motion with evidence. We see no error in such ruling.

Appellants argue that the Agents, in making forcible entry of both premises, exceeded their authority. The entry at 19 Allen Street was made only after proper announcement, and was in compliance with 18 U. S. C. § 3109.[6] *Miller v. United States*, 357 U. S. 301, on which appellants rely, is distinguishable. There is no question that the entry into 111 N. Pearl Street by two of the Agents was legal. They knocked on the rear door, announced their authority and purpose, and were admitted. A second, later entry was made by Agents who broke in the front door, apparently without announcing their authority and purpose. Inasmuch as the earlier action on the part of the Agents at the rear door was legal and the invasion of the privacy protected by the Fourth Amendment and 18 U. S. C. § 3109 was both complete and proper, we need not pass on the legality of the second follow-up entry on the same warrant. It would not invalidate the prior entry. Furthermore, the four items seized at 111 N. Pearl Street which were admitted into evidence[7] were found by, and introduced

[6] One of the Agents stated in a loud voice "Federal police officer with a search warrant." After "possibly a minute or two, maybe more," having heard no answer or movement, the Agents forced the door. We find this adequate compliance with 18 U. S. C. § 3109, which states, in part:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance. * * *"

[7] Several additional items were listed on the search warrant as having been found at 111 N. Pearl, but the Government did not seek to introduce them.

through, the Agent whose entry was proper.[8] We hold the evidence thus admitted was not illegally seized.

The appellants also complain that the trial judge failed until the end of the second day of trial to admonish the jurors not to discuss the case among themselves. It has never been the law of this circuit that the trial judge must admonish the jurors not to discuss the case among themselves, although it has been the practice of most of the judges to suggest that it is advisable to refrain from such discussion until the case is concluded. Compare *Myres v. United States*, 8 Cir., 174 F. 2d 329. In any event, we hold that the trial judge did not commit any error in this matter, especially since counsel did not request such an instruction, and since such an instruction was in fact given the second day of the trial.

Appellants contend that Judge Henderson interfered with the examination of Government witnesses by asking repeated questions, and read his charge too rapidly. We can find in the record no objection made by appellants to either of these alleged errors of the trial judge. Apparently they were afterthoughts, for purposes of appeal. The record discloses no error.

Delli Paoli v. United States, 352 U. S. 232, held that admission of a post-conspiracy admission is not error, provided the trial court takes adequate precautions to prevent the jury from using the evidence against co-defendants. In the instant case, testimony was heard, without objection, of statements made by the defendant Fino. The trial judge

[8] As to one item, a telephone found in a cellar, the Agent who entered properly testified "I actually put the information on the bottom of this. It also contains the initials, J. M. D. [an Agent who entered through the front door] on [this exhibit:] * * * it contains my writing and my initials."

later charged on his own motion that such statements could not be considered as evidence against other defendants. Hence there was no error.

The contention is made that it was error to allow an Agent to testify as to the nature of certain writings found on the premises after he had failed to qualify as an expert. The record demonstrates that the only "writings" let in through the testimony of Agent Balen, to whom appellants refer, consisted of two racing sheets (available to the public at large) and a newspaper. Certain notes made by Balen, while he took bets over the telephone at 19 Allen Street for three hours after the raid, were not allowed in; they were used by Balen only to refresh his recollection as to the substance of the telephone calls, as to which he testified orally and without comment, for the court refused to qualify him as an expert in off-track wagering. This allegation of error is baseless.

Appellants claim that no copy of the Government's requests to charge was ever given them in accordance with F. R. Crim. P. 30.[*] Appellants admit their inability to prove this,[*] and in any event the Government's requests were substantially included in the actual charge given by the court which went without exception. There is no error here.

Appellants' final argument is that the refusal of the court to charge their requests 2 and 6 constituted error. Request 6 dealt with circumstantial evidence. Although the court's charge on this issue was not too full, it was perfectly acceptable under *Holland v. United States*, 348 U. S. 121, 139-140, since the charge was exceedingly

[*] See appellants' brief, p. 27.

thorough on the issue of reasonable doubt. Request 2 asked the court to instruct the jury on the rule of *Ingram v. United States*, 360 U. S. 672, which held, in a numbers case, that two defendants, minor employees of other defendants, being not themselves liable for the tax were not liable for conspiracy to avoid the tax, where they did not know their employer was liable for it. That case is not this case. Here, the Government proceeded on the theory that each appellant was liable for the tax. Thus appellants' requested charge 2 was properly refused, as well as requested charge 6.

The convictions of Viale, Pinnavia, Abbonando, Fino, and Longo are affirmed; the conviction of Faliero is reversed, and the indictment ordered dismissed as to him.

Appendix B

DECISION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

LOUIS C. VIALE, *et al.*,

Defendants.

No. 7957-C.

John T. Curtin, United States Attorney (Charles F. Crimi, Assistant U. S. Attorney, of Counsel), for the United States:

Peter L. Parrino, Buffalo, New York, Attorney for Defendants.

The defendants move to set aside the jury's verdict, claiming in part that the court improperly admitted certain evidence offered by the Government.

The defendants, prior to trial, moved to suppress this evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. The motion was denied, but was again renewed upon the trial. At that time extensive argument was heard and memoranda submitted by the Government and defendants' counsel were considered. Defendants' argument was, and is now premised in part upon the applicability of the state law of arrest. The court, in addition to considering the admissibility of evidence upon this premise, has noted authority which would indicate that

the federal officers under federal law possessed ample authority to arrest under the circumstances.[1] In either instance the court concludes the evidence was properly admitted. The defendants' motion is in all respects denied. So ordered.

JOHN O. HENDERSON,
United States District Judge.

Dated: May 29, 1962.

Appendix C

UNITED STATES CONSTITUTION, AMENDMENT IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4. Warrant or Summons upon Complaint.

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a war-

[1] United States v. Murphy, 290 F. 2d 573 (3rd Cir. 1961).

rant for the arrest of the defendant shall issue to any officer authorized by law to execute it.....

(c) Execution or Service; and Return.

(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law.....

Rule 41. Search and Seizure.

(e) Issuance and Contents.....The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States.....

TITLE 18 UNITED STATES CODE

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

§ 3109. Breaking doors or windows for entry or exit.

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. June 25, 1948, c. 645, 62 Stat. 820.

TITLE 26 UNITED STATES CODE

§ 4401. Imposition of tax.

(a) Wagers. —There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 per cent of the amount thereof.

(b) Amount of Wager. —In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax. —Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such

pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. As amended Sept. 2, 1958, Pub. L. 85-859, Title I, § 151(a), 72 Stat. 1304.

§ 4411. Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Aug. 16, 1954, 9:45 a. m. E.D.T., c. 736, 68A Stat. 527.

§ 4412. Registration.

(a) Requirement. —Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company. —Where subsection (a) requires the name and place of residence of a firm or company to be

registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information. —In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 a. m. E.D.T., c. 736, 68A Stat. 527.

§ 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851.

§ 7262. Violation of occupational tax laws relating to wagering—Failure to pay special tax.

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the pay-

ment of the tax, be fined not less than $1,000 and not more than $5,000. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 862.

§ 7608. Authority of internal revenue enforcement officers.

(a) Enforcement of subtitle E and other laws pertaining to liquor, tobacco, and firearms. —Any investigator, agent, or other internal revenue officer by whatever term designated, whom the Secretary or his delegate charges with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of subtitle E or of any other law of the United States pertaining to the commodities subject to tax under such subtitle for the enforcement of which the Secretary or his delegate is responsible, may—

(1) carry firearms;

(2) execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;

(3) in respect to the performance of such duty, make arrests without warrant for any offense against the United States committed in his presence, or for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony; and

(4) in respect to the performance of such duty, make seizures of property subject to forfeiture to the United States.

(b) Enforcement of laws relating to internal revenue other than subtitle E.—

Appendix C

(1) Any criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service whom the Secretary or his delegate charges with the duty of enforcing any of the criminal provisions of the internal revenue laws or any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary or his delegate is responsible is, in the performance of his duties, authorized to perform the functions described in paragraph (2).

(2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are—

(A) to execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;

(B) to make arrests without warrant for any offense against the United States relating to the internal revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable grounds to believe that the person to be arrested has committed or is committing any such felony; and

(C) to make seizures of property subject to forfeiture under the internal revenue laws.

Added Pub. L. 85-859, Title II, § 204(14), Sept. 2, 1958, 72 Stat. 1429, amended Pub. L. 87-863, § 6(a), Oct. 23, 1962, 76 Stat. 1143.

Appendix C

McKINNEY'S NEW YORK CODE OF CRIMINAL PROCEDURE

§ 154. Who are peace officers.

A peace officer is a sheriff of a county, or his under sheriff or deputy, or a county detective appointed pursuant to chapter sixty-two of the laws of eighteen hundred ninety seven, as amended by chapter five hundred and thirty-two of the laws of nineteen hundred and by chapter five hundred ninety-eight of the laws of nineteen hundred and eleven, or a constable, marshal, police constable or policeman of a county, city, town or village, or a county detective employed in the office of the district attorney in any county embraced wholly within the limits of a city, or an attendant, uniformed court officer or an official of the supreme court in the first and second department, or the criminal investigators attached to the district attorney's office in the counties of Kings, Bronx, Erie and Suffolk, or an attendant, uniformed court officer or other official attached to the county court of Nassau county, or a clerk or attendant of the district court of Suffolk county, or a clerk or attendant of the district court of Nassau county, or a criminal investigator employed in the office of the district attorney in the county of Queens, or a clerk, uniformed court officer or other official of the criminal court of the city of New York, or an attendant, or an official, or guard of any state prison or of any penal correctional institution, or an officer of the staff of the board of parole in the executive department, or state park patrolman or an attendant, uniformed court officer or an official of the civil court of the city of New York, or an attendant, clerk or uniformed court officer of the family court, or a patrolman, officer, or other member of the police force appointed by the Port

of New York Authority, or an investigator of the waterfront commission of New York harbor, or an investigator of the office of the state commission of investigation, or a patrolman, officer or other member of the police force appointed by the New York State bridge authority, or a member of the uniformed force of the New York city transit police, or a member of the uniformed force of the New York city housing authority police, or a detective investigator in the office of a district attorney, or a member of the Westchester county parkway police force, or the criminal investigator attached to the district attorney's office of Westchester county, or the criminal investigator attached to the district attorney's office of Rockland county, or the special investigator attached to the district attorney's office of Orange county, or an officer or agent of a duly incorporated society for the prevention of cruelty to animals or children, or an inspector or investigator of the department of agriculture and markets, the chief and deputy chief fire marshals and the assistant fire marshals and special investigators of the bureau of fire investigation of the New York city fire department, or the chief of the bureau of law enforcement and field services, assistant superintendent of law enforcement, district marine fisheries protectors, assistant district game protectors, and regular game protectors in the conservation department. Nothing herein shall be construed as requiring the chief of the bureau of law enforcement and field services, assistant superintendent of law enforcement district marine fisheries protectors, marine fisheries protectors, district game protectors, assistant district game protectors, and regular game protectors in the conservation department to enforce the provisions of the penal law, or of any county, city,

town or village ordinance or of any law other than the conservation law except to the extent necessary to enforce all the laws relating to fish and game. As amended L. 1958, c. 989, § 8; L. 1959, cc. 734, 815; L. 1960, c. 1019; L. 1961, cc. 235, 736; L. 1962, c. 695, § 26, eff. Sept. 1, 1962; L. 1962, c. 811, § 3, eff. April 24, 1962; L. 1962, c. 833, eff. July 1, 1962.

§ 167. Arrest, defined.

Arrest is the taking of a person into custody that he may be held to answer for a crime.

§ 171. How an arrest is made.

An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer.

§ 177. In what cases allowed.

A peace officer may, without a warrant, arrest a person,

1. For a crime, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;

5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this code. As amended L. 1958, c. 706, § 1; L. 1960, c. 942, eff. April 28, 1960.

Chapter V.—Arrest By a Private Person.

§ 183. In what cases allowed.

A private person may arrest another,

1. For a crime, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence.

§ 798. By Whom Executed.

A search warrant may, in all cases, be executed by any of the officers mentioned in its direction, but by no other person, except in aid of the officer, on his requiring it, he being present and acting in its execution. As amended L. 1962, c. 542, § 8, eff. July 1, 1962.

§ 960. Definition of "peace officer."

Unless when otherwise provided, the term "peace officer" signifies any one of the officers mentioned in section one hundred and fifty-four.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 914

LOUIS C. VIALE, JOSEPH S. PINNAVIA, LOUIS A. ABBONANDO, ANTHONY F. FINO AND NICHOLAS S. LONGO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on January 31, 1963 (Pet. 17). The petition for a writ of certiorari was filed on March 8, 1963, and was therefore out of time under Rule 22–2 of the Rules of this Court.

In any event, the questions raised do not merit the consideration of the Court. After a jury trial in the United States District Court for the Western District of New York, petitioners, together with co-defendant Faliero, were convicted under a three-count indictment charging conspiracy (18 U.S.C. 371),

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failure to pay the special occupational tax for accepting wagers (26 U.S.C. 4411 and 7262), and failure to register and file a return (26 U.S.C. 7203). Petitioner Viale was sentenced to imprisonment for one year and to pay fines totaling $5,000; Fino to imprisonment for one year and to pay fines totaling $3,000; Pinnavia, Abbonando, Longo and Faliero to fines totaling $3,000 and to one-year prison sentences which were suspended for a probation period of five years (I R. 8–23). The court of appeals reversed as to Faliero but affirmed the convictions of petitioners (Pet. 17–30).

Prior to trial, petitioners moved to suppress all evidence seized under search warrant on May 12, 1961, at 19 Allen Street, Buffalo, New York (a business building owned and occupied by petitioner Viale), and at 111 North Pearl Street (a residence building at the rear of the other building, also owned and occupied by Viale). The single ground of the motion was that the officers failed to comply with the requirements as to entry set forth in *Miller* v. *United States,* 357 U.S. 301. During the argument of this motion, petitioners' counsel mentioned that the officers also searched the persons of individuals who were found on the premises, but conceded that this was not within the scope of the motion (II R. 9). Counsel refused the invitation of the court to offer evidence, and the motion was denied (II R. 14). At the trial, however, evidence relevant to the motion was heard.

Internal Revenue Agent Willis testified that on April 11, 1961, he was introduced to Viale at the latter's haberdashery at 19 Allen Street and Viale

agreed to accept bets on horse races from him. After accepting bets on several occasions, Viale agreed to pay Willis a commission and gave him three telephone numbers to which he was to call in his bets in the future (II R. 16–18). Through a subsequent conversation with Viale, Willis learned the nicknames of three of the men who would receive the bets.[1] Willis settled a total of $2,057 in bets with Viale during the month prior to May 12, while agents kept the premises under surveillance (II R. 19–27). It was ascertained that neither Viale nor anyone else located at these two addresses had procured tax stamps (II R. 32).

A search warrant for both addresses and an arrest warrant for Viale were executed on May 12 at approximately 11:45 a.m. Agents approached the two buildings from both front and rear. An agent at the rear of the business building (Allen Street) knocked on the door and called in a loud voice that they were federal officers with a search warrant. After waiting two or three minutes with no response, they forced the lock with a sledge hammer and entered (II R. 28). Ascending the stairs to the second floor, they went through a vacant sitting room to another room where they found four men. Three of the men—later identified as Fino, Abbonando and Pinnavia—were seated at a table which held a large rack and other wagering paraphernalia. Longo was in a

[1] These were "Jimmy", "Nick" and "Tony". The full names of three of the defendants subsequently arrested at the Allen Street address were Marino J. Faliero, Anthony Fino and Nicholas Longo.

chair next to the table. All of the men jumped to their feet; Pinnavia scattered papers to the floor and Fino dropped the telephone he was holding and beat a hasty retreat to the next room, locking the door behind him (I R. 62–64; II R. 28–29, 55–56).

The door to the other room was forced and Fino was brought back. They were all asked what they were doing there. Fino said he was there to clean the rooms (I R. 64); Pinnavia, that he was on a visit (I R. 82). The men were searched, and each was found to have a Yale key which would operate the lock on the door opening to the second floor stairway (I R. 64, 79, 81, 83). Abbonando's wallet contained a card with some telephone numbers written on it (I R. 81). None had any tax stamps on his person (I R. 89). They were told they were under arrest (I R. 91).

The court of appeals found that the evidence overwhelmingly sustained the conviction of Viale. It held that 26 U.S.C. 7608, the statute relied upon by the government to support the arrest without warrant and the personal search of the other petitioners, did not (as of May 12, 1961) apply to arrests for violations of the wagering tax laws, which appear in subtitles D and F of Title 26, but only to violations of subtitle E. Accordingly, the validity of the arrest was governed by state law. *United States* v. *Di Re*, 332 U.S. 581. Since a federal revenue agent is not a "peace officer" within the meaning of Section 177 of the New York Code of Criminal Procedure, the court appraised the validity of the arrest under Section 183 of that Code, which authorizes a "private person"

to arrest another "[f]or a crime, committed or attempted in his presence," or "[w]hen the person arrested has committed a felony, although not in his presence." Though recognizing that the indictment could have charged petitioners with felonies, 26 U.S.C. § 7201, the court observed that they were in fact charged with misdemeanors and that, in the absence of an adjudicated felony, the arrests were justified only if the crimes were committed in the "presence" of the arresting officers—*i.e.*, only if the officers actually witnessed acts which would indicate to a reasonable man that a crime was in the course of commission.

The questions raised by petitioners have no significance for the future, since 26 U.S.C. 7608 has been amended, effective as of October 23, 1962 (76 Stat. 1143), to cover the type of revenue agents involved here. In any event, the arguments advanced in the petition are without merit.

In this Court petitioners contend that the agents not only had no authority to arrest, but that they had no authority even to execute the search warrant, inasmuch as they were not covered by 26 U.S.C. 7608. However, 18 U.S.C. 3105 provides that a search warrant "may in all cases be served by any of the officers mentioned in its direction," as well as "by an officer authorized by law to serve such warrant." The agents here were "officers" within the meaning of this provision, since under 26 U.S.C. 7803 the Secretary of the Treasury or his delegate is authorized to appoint such persons as he may deem proper for the enforcement of the internal revenue laws.

Moreover, contrary to petitioners' contention, the arrests were plainly valid. The agents had already ascertained that neither Viale nor any of the other petitioners had procured tax stamps, and no stamps were posted on the premises, as required by 26 U.S.C. 6806. Petitioners were all seated at a table upon which various wagering paraphernalia were placed; and two of petitioners, Fino and Pinnavia, were using the telephones when the agents entered the room. Thus, the agents had ample reason to believe that Fino and Pinnavia were in the process of accepting wagers illegally. And since petitioners Abbonando and Longo were present in the same room and seated at the same table, it was reasonable to suppose that these two petitioners were then and there participating in a conspiracy with the others.

Finally, the officers plainly had the right to undertake a search of petitioners' persons as an incident to the valid arrests. The court of appeals properly noted that the rationale which justifies a search of the arrestee's person and premises in connection with a lawful arrest—as set forth in *United States* v. *Rabinowitz*, 339 U.S. 56, 60–61—is equally applicable whether the arrest is made by an officer or by a private citizen. But even if the right of a private person to search the *premises* of the arrestee be more limited than the corresponding right of a public officer, there can be no doubt, we think, that the private arrestor's right of search extends at least to the *person* of the arrestee. Thus, the search of the premises here were justified by the search warrants; and the search of the person was permissible as an

incident of the arrests. See, in addition to the cases cited by the court of appeals, *Dorsey* v. *United States*, 174 F. 2d 899 (C.A. 5), certiorari denied, 338 U.S. 950.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

APRIL 1963.

U. S. GOVERNMENT PRINTING OFFICE 1963